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AUG 25 1983
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83-312

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ANTHONY CORRICELLI,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Whether the jury was allowed to convict the petitioner upon proof of a conspiracy other than the one referred to in the indictment?

II. Whether the refusal to instruct the jury that incarceration may constitute withdrawal from a conspiracy impermissibly invaded the function of the jury?

III. Whether it was plain error to exclude hospital records which contained prior inconsistent statements of the Court's witness concerning his fear of the petitioner?

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OPINION BELOW

The Court of Appeals issued an unpublished opinion (81-1897) on July 29, 1983 (Pet App. p. 17).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

STATEMENT

After a jury trial in the United States District Court for the District of New Hampshire, the petitioner, Anthony Corricelli, was convicted of One count of conspiracy to manufacture cocaine in violation of 21 U.S.C. Sec. 841(9)(1) and 846. The petitioner was sentenced to five (5) years imprisonment. The Court of Appeals upheld the conviction on July 29, 1983.

1. The trial evidence was summarized in the opinion of the Court of Appeals (Pet App. p. 22-26). The evidence suggested that the defendant approached William Collibee, a pharmacist, in early 1979 and discussed the possibility of manufacturing cocaine. Later in 1979 Arthur Griffin, the owner of a furniture refinishing business, joined with the petitioner and Collibee in an attempt to order certain

chemicals which were cocaine precursors. (Id. at p.22).

The drug supply company notified the Drug Enforcement Agency which monitored the delivery of the precursor. Collibee and Corricelli then attempted unsuccessfully to synthesize cocaine. After that failure, Collibee was jailed in Maine on unrelated charges.

In the spring of 1980, after Collibee was in jail, the petitioner met Billings, a New Hampshire school teacher. Corricelli gave the chemicals to Billings since he had no use for them at that time (Tr. Vol. VI, pp. 1076-77). Billings then ordered certain chemical analysis tests and ordered another precursor chemical which brought him to the attention of the DEA (Pet. App. p. 24). Billings' phone records showed several calls to Corricelli during this period (Pet. App. p.25).

Collibee testified that after Billings was confronted by the FBI Corricelli called him twice; once to suggest he, Collibee, hire an attorney and once stating that he and Collibee had purchased the chemicals for the purpose of stripping furniture (Pet. App. p.25).

2. On appeal the petitioner alleged that the case, as proved by the Government, was in variance with the case as indicted since the evidence suggested two possible conspiracies, one in Massachusetts and one in New Hampshire and the indictment alleged one on-going conspiracy. The Appeals Court held that any variance was not prejudicial and that there was sufficient evidence to link Billings to the petitioner (Pet. App. p.26-28).

The Court held that the trial court's refusal to specifically instruct that the incarceration of Collibee could constitute his withdrawal of the conspiracy was immaterial

(Pet. App. p.28-29). The Court also held that the trial court's refusal to exclude certain hospital records which impeached Collibee was not error since they constituted extrinsic evidence on a matter of impeachment and were too ambiguous and collaterial as prior inconsistent statements. (Pet. App. p.32-33).

STATUTES AND RULES RELIED ON

Federal Rule of Evidence 608(6)

> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Federal Rule of Evidence 613(b)

> (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness

is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Federal Rule of Criminal Procedure 52(b)

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

ARGUMENT

I. THE JURY WAS ALLOWED TO CONVICT THE PETITIONER UPON PROOF OF A CONSPIRACY OTHER THAN THE ONE REFERRED TO IN THE INDICTMENT.

The jury instructions allowed the jury to convict the defendant on the basis of a separate Massachusetts conspiracy even if it found that the New Hampshire conspiracy was unfounded.

The Petitioner was charged with one count of conspiracy. He allegedly conspired with Collibee, Billings and Griffin to manufacture cocaine in New Hampshire. The Petitioner at trial claimed that one conspiracy had existed in Massachusetts; and that it terminated when Griffin, the supplier of drugs, lost interest and Collibee, the chemist for the conspiracy, went to jail. The

Petitioner claimed that a second and unrelated nexus was then formed between the Petitioner and Billings in New Hampshire. The Appeals Court noted in its decision that "The evidence might be construed to establish one conspiracy between defendant, Collibee and Griffin, and another between defendant and Billings." (Pet. App. at p.26-27). The Appeals Court noted that since the Petitioner had been part of both groups he was not prejudiced. This analysis misses the thrust of the Petitioner's claim.

The jury instructions would reasonably lead a jury to believe that they could convict even if they agreed with the Defendant that one completed conspiracy took place in Massachusetts

and that all of the activity in New Hampshire was innocent.

The Judge instructed that

> "Although the indictment charges a single conspiracy, it would be possible for you to find separate conspirators, one involving the Defendant Anthony Corricelli and the unindicted co-conspirators William Collibee and Edward Griffin, and the other involving the defendants Corricelli and Billings whether there was one conspiracy or two conspiracies or no conspiracy at all is a fact for you to determine in accordance with these instructions."
>
> (Tr. Vol. VII p.1327)

This instruction allows conviction upon proof of a Massachusetts conspiracy despite the fact that such a conspiracy was not charged in the indictment.

It is black letter law that an indictment must be proved as charged.

Eaton v. Tulsa, 415 U.S. 697, 698-699, 94 S. Ct. 1228, 39 L. Ed. 2d 693 (1974) (Per Curriam); U.S. v. Butler, 494 F. 2d 1246, 1255 (10th Cir. 1974).

In particular, the Petitioner is entitled to an instruction that he should be acquitted if the Court does not prove the conspiracy it has charged. McGunnigal v. U.S., 151 F. 2d 162, 164 (1st Cir., 1945) cert. denied, 326 U.S. 776 (1945); U.S. v. Sperling, 506 F. 2d 1323, 1341 (2d Cir., 1974); U.S. v. Tramunti, 513 F. 2d 1087, 1107 (2d Cir., 1975) cert. denied 423 U.S. 832 (1975).

The Appeals Court by focusing on the issue of whether or not the

Petitioner was in fact a part of the Massachusetts conspiracy (Pet. Appl. p.27) glosses over the possibility that, as the Petitioner claimed, he was part of a Massachusetts conspiracy which fell short of production of cocaine and his activities in New Hampshire were innocent. The potential for jury misunderstanding is highlighted by the jury question during deliberations which dealt with whether defendants could be found to be part of different numbers of conspiracies (Tr. Vol. p. 1342, 1343).

II. THE REFUSAL TO INSTRUCT THE JURY THAT INCARCERATION MAY CONSTITUTE WITHDRAWAL FROM A CONSPIRACY IMPERMISSIBLY INVADED THE FUNCTION OF THE JURY.

Incarceration of a co-conspirator can constitute withdrawal from a conspiracy, e.g., U.S. v. Panebianco, 543 F. 2d 447, 453 (2d Cir., 1976), cert. denied 429 U.S. 1103 (1977); U.S. v. Agueci, 310 F. 2d 817, 839 (2d Cir., 1962) cert. denied, 372 U.S. 959 (1963). The Government seems to concede that this legal position is correct. (Brief for Appellee, pages 20-23).

The trial judge in this case flatly refused to give an instruction on the effect of incarceration in a conspiracy case. He explained that "(i)f I put you in the clink and you can't operate that's not a form of withdrawal as far as I'm concerned", (Tr. Vol. VII, p.

1339). This refusal to instruct was error which prejudiced the Petitioner.

The Appeals Court did not hold that the trial court's instructions were correct. It denied relief on the grounds that the defendant was not prejudiced even if the instruction was incorrect. (Pet. App. p. 29). The Court reasoned that since there had been one on-going conspiracy with the Defendant in the middle, the withdrawal of one co-conspirator would have no effect. This reasoning ignores the court's earlier discussion under the variance issue as to the possibility that the jury could have found two conspiracies. (Pet. App. p. 26). One reasonable interpretation of the evidence was that the Defendant's dealings

with Billings in New Hampshire were innocent. (Trial Transcript pgs. 939-85) and that by the summer of 1980 Griffin had already withdrawn from any Massachusetts conspiracy, (either on the theory that he was not a knowing participant) (Tr. Vol. 1, pp. 188, 94), or that he withdrew (Tr. Vol. 1, pp. 203-204). If the jury had adopted that view of the evidence, as it was entitled to, the only possible theory for conviction was that Collibee had not withdrawn and that the conspiracy existed between the Defendant and Collibee.

The failure to instruct on the effect of incarceration upon Collibee's role as a co-conspirator was to remove

a central factual issue from the jury's consideration.

The Court also noted the Petitioner's failure to request an instruction or object to the Court's instruction. Initially this is not a situation in which the failure to object precluded the possibility of correcting the problem at the trial level. The co-defendant did object and the Court refused to correct the situation. (Tr. Vol. VII, p. 1339). This is a case of plain error which the District Court should have corrected despite a failure to specifically object. Fed. R. Crim. Proc. 52(6).

Here neither the Government, nor the Appeals Court disputes that the

requested instructions would have been appropriate. The argument that the Petitioner was not prejudiced is based upon a clear misperception of the evidence.

III. THE COURT ERRED IN EXCLUDING THE HOSPITAL RECORD WHICH REVEALED THE PRIOR INCONSISTENT STATEMENT OF COLLIBEE CONCERNING HIS FEAR OF THE DEFENDANT.

The Court's theory of prosection was that the Petitioner was a mastermind who manipulated and coerced others into cooperating with him in a drug manufacturing scheme. As part of that theory, the Court offered the direct testimony of Collibee that he entered a hospital in Maine solely because of his fear of the Defendant. Collibee insisted that fear was the reason for his admission to the hospital and specifically denied that it was due to his drug problem. (Tr. Vol. III p. 316).

At the close of the Government's case, the Defendant offered the hospital record which was replete with reference to Collibee's drug problem and included the notation that "the patient says he took Quaalude today and realized that his drug habit and his pressures were escalating." (Pet. App. p. 31). The Court refused to allow its introduction on the theory that Federal Rules of Evidence 608 (6) does not allow the admission of extrinsic evidence of specific misconduct for purposes of attacking credibility.

It was plain error U.S. v. Edwards, 696 F. 2d 1277, 1281-82 (11th Cir., 1980) for the Court not to have allowed this evidence, pursuant to Federal Rules of Evidence 613(b), since it was

extrinsic evidence of a prior inconsistent statement. The Appeals Court admitted in its opinion that "the hospital records could be interpreted to contradict, at least partially, Collibee's stated reason for entering the hospital..." (Pet. App. p. 48) but ruled that the exclusion of the records was not plain error because of their "tangential relevancy and inherent ambiguity." (Pet. App. p.33).

The records are not ambiguous. Collibee claimed he went to the hospital solely because of his fear of the Defendant. The records indicate that his stated reason at the time of admission was, at least in part, his drug problem. This was a classic prior inconsistent statement.

The Appeals Court claimed that this statement was of tangential relevancy since its only purpose was to dispute the Petitioner's role in the conspiracy. This is too narrow a view of the evidence. An essential question for the jury was Collibee's motivation in first cooperating with the Petitioner and later cooperating with the Court. Collibee's explanation that his cooperation with the Petitioner was due to the fear of the Petitioner because he was the "king pin" in the conspiracy, essential to its theory that after Collibee withdrew the conspiracy went on captained by the Petitioner. If the jury were allowed to consider the possibility that Collibee deliberately lied about his fear of the Petitioner, it might well

have been lead to doubt Collibee's credibility generally.

It has long been held that a prior inconsistent statement may help impeach a witness for more than the particular issue it deals with. For instance, the long approved jury charge on the weight that should be given to prior inconsistent statements aptly summarizes the use to which such statements can be put.

> "If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves."
>
> Sec. 17.08 Federal Jury Practice and Instructions, DeVitt and Blackmar (1977)

The Appeals Court in its decision that the defendant was not prejudiced limited its consideration to the particular issue of whether or not Collibee went to the hospital because of fear of the Defendant. This prior inconsistent statement could have far broader impact if the jury doubted Collibee's credibility generally because of this inconsistency.

In this case, a statement which went to the heart of the Court's theory of prosecution was excluded. This exclusion amounts to clear error.

CONCLUSION

For these reasons the Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 81-1897

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY CORRICELLI,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

/Hon. Shane Devine, U.S. District Judge/

Before

Campbell, Chief Judge,

Bownes, Circuit Judge,

and Re,* Chief Judge.

Carol S. Epstein, with whom Epstein, King & Isselbacher was on brief, for appellant.

Robert J. Lynn, First Assistant U.S. Attorney, with whom W. Stephen Thayer, III, U.S. Attorney, was on brief,

July 29, 1983

BOWNES, Circuit Judge. Defendant-appellant Anthony Corricelli appeals a jury conviction of conspiracy to manufacture cocaine in violation of 21 U.S.C. Sec. 841 (a) (1)[1] and 846.[2] Corricelli's co-defendant and alleged co-conspirator, Dana Billings, was also convicted of the same offense, but has not appealed.

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1. Section 841(a)(1) provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

2. Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The issues before us are as follow: whether there was a fatal variance between the indictment and the evidence; whether the district court erred in failing to instruct the jury properly during the trial; whether the district court erred in excluding certain hospital records; and whether the jury charge was erroneous. We find no reversible errors.

The indictment charged Corricelli and Billings with conspiring together and with William Collibee and Edward Griffin, two unindicted co-conspirators, to manufacture cocaine by chemical synthesis.[3]

---

3. The indictment states as follows: From on or about April 1, 1979 to on or about December 31, 1980, both dates being approximate and inclusive, in the District of New Hampshire and elsewhere, ANTHONY CORRICELLI and DANA BILLINGS, the defendants, did knowingly, intentionally and unlawfully, combine, conspire, confederate and agree.....

We review the evidence, including all reasonable inferences to be drawn from it, in the light most favorable to the government. United States v. Gilberto Quejada-Zurique, No. 82-1764, slip op. at 5 (1st Cir. June 1, 1983); United States v. Fortes, 619 F. 2d 108, 122 (1st Cir. 1980).

In early 1979 Corricelli approached Collibee, a pharmacist, and asked him about the feasibility of manufacturing cocaine by chemical synthesis. Collibee, a neophyte in chemistry, thought this might be possible. He did some research in the Boston Public

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3. (cont.) .....together and with William Collibee and Edward Griffin, named herein as co-conspirators but unknown to the grand jury, to manufacture a large quantity of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841 (a) (1).

All in violation of Title 21, United States Code, Section 846.

Library and found a German formula for such a process. Collibee gave a list of the chemicals required to Corricelli. The other unindicted co-conspirator, Arthur Griffin, owned and operated a furniture refinishing business called Barney's Stripping and Refinishing. Corricelli promised Griffin $5,000 when the cocaine was manufactured if the precursor chemicals needed for the synthesizing process could be ordered in Barney's name. Griffin agreed and an order for the chemicals on Collibee's list was sent to the Aldrich Chemical Company, Milwaukee, Wisconsin.

The suspicions of Aldrich's officials were aroused by the order because it consisted of precursor chemicals that could be used to make cocaine,

and the United States Drug Enforcement Agency (DEA) was promptly contacted. The first portion of the order was delivered to Barney's on September 11, 1979, and receipted for by Griffin; Barney's was under surveillance by DEA agents. When Corricelli picked up the chemicals the agents followed him to his house and saw him deposit the chemicals there. Sometime later Corricelli rented a house in Nahant, Massachusetts, and all of the chemicals and equipment purchased for the manufacture of cocaine were taken there. This included the balance of the order from Aldrich, which was delivered to Barney's, as well as laboratory equipment bought from Fisher Scientific Company. Corricelli paid for all the materials.

A laboratory was set up in the Nahant house; Corricelli, Collibee, and another person attempted unsuccessfully to synthesize the precursor chemicals into cocaine. The failure of the experiment made Corricelli angry; he threatened physical harm to Collibee and his unborn child and told Collibee "it better work next time." There was no next time for Collibee; he went to jail in Maine on unrelated charges. Corricelli asked Collibee before he started his jail term for more details on the synthetic production of cocaine. Collibee was also told by Corricelli that if he could not make cocaine, he (Corricelli) would get somebody else who could. Corricelli told Griffin that Collibee "had screwed up"

and he was going to get another chemist. Billings then appeared on the scene.

Corricelli met Billings in the early spring of 1980. Billings was a high school chemistry teacher. He was interested in karate and was introduced to Corricelli who claimed to be proficient in this skill. Sometime later Corricelli turned over to Billings the chemicals that remained after the failed attempt at cocaine synthesis in Nahant. Billings stored the chemicals in the teacher's storage area at Hopkinton High School where he taught chemistry.

Billings' requested that the instrumentation center at the University of New Hampshire make a spectrographic analysis of a sample chemical compound to determine if a specific chemical

reaction had occurred. The tests done on the sample furnished by Billings proved inconclusive. Less than two weeks after Billings learned of the test results, he ordered ten kilograms of the same compound from the Ventron Corporation of Danvers, Massachusetts, for which he paid $2,260. Ventron recognized the chemical compound as a cocaine precursor and, as Aldrich had done, promptly notified the DEA.

A controlled delivery was arranged, and the noose settled around Billings' neck. His telephone toll records showed a number of calls to Corricelli in November and December of 1980. A DEA investigation disclosed that the storage area at the Hopkinton High School contained all the chemicals ordered from Aldrich and the equipment

purchased from Fisher Scientific by Corricelli in 1979.

A short time after the DEA formally confronted Billings, Corricelli called Collibee and told him that he had given the chemicals to someone from out-of-state who had gotten into trouble with them. He strongly suggested that Collibee call a lawyer if he were contacted by law enforcement officials. After Collibee had been subpoenaed to testify before the grand jury, Corricelli called him again. He stated that the only purpose he and Collibee had in purchasing the chemicals was to make a furniture stripper. Collibee testified that he understood from Corricelli's tone that this is what he expected Collibee to tell the grand jury. Collibee also testified that he

was afraid of Corricelli and was intimidated by him.

There was testimony by a government chemist that the chemicals seized from the storage area at the high school were the key precursors needed for the synthesis of cocaine and there was no other explanation for this combination of chemicals.

Variance

The law on variance makes it clear that it matters little in the context of this case whether there were two conspiracies or one. The basic rule is that any variance is immaterial where the allegation and proof substantially correspond, or where the variance was not of the character which could mislead the

defendant at trial or "not such as to deprive the accused of his right to be protected against another prosecution for the same offense." Berger v. United States, 295 U.S. 78, 83 (1935); United States v. Izzi, 613 F. 2d 1205, 1210 (1st Cir.), cert. denied, 446 U.S. 940 (1980). The evidence here fell well within the parameters of the indictment. The variance, if any, could not have misled defendant at trial and defendant's double jeopardy rights would be clearly violated if he were prosecuted again for a conspiracy to manufacture cocaine with Billings or Collibee or Griffin or any combination thereof during this time frame.

If there were two conspiracies, the defendant was the chief conspirator in both. The evidence might be

construed to establish one conspiracy between defendant, Collibee and Griffin and another between defendant and Billings. The jury could also have supportably found an ongoing conspiracy orchestrated by defendant with different supporting players. In either case, the evidence was more than sufficient to convict. Therefore, even if there was a variance, it was not prejudicial. Defendant was not unfairly harmed by having attributed to him the crimes of a conspiracy of which he was not a part. United States v. David E. Thompson, Inc., 621 F. 2d 1147, 1152 (1st Cir. 1980).

Defendant appears to argue that because he and Billings denied any conspiracy, none was proved between them. Although the evidence linking

defendant and Billings was circumstantial, it was strong. The chemicals and equipment that defendant had purchased for Collibee's failed attempt to synthesize cocaine were given to Billings. Defendant's remarks to Collibee that if he could not make it work that he (defendant) would get someone who could are a solid basis for the inference that the person defendant got was Billings.

The jury could also supportably infer that defendant had put up the $2,260 for Billings' purchase of the precursor chemical from Ventron. Billings' yearly salary as a teacher was $10,600; during this period he borrowed $5,000 from his parents for a down payment on a home. Defendant had cheerfully bankrolled the purchase of

all the other materials. Billings' less than affluent financial condition and defendant's apparent willingness to invest in the enterprise was evidence from which the jury could find that the money for the Ventron purchase came from defendant.

In the final analysis, the evidence shows a scheme for the manufacture of cocaine which was originated by defendant and in which he had the willing assistance at different times of Collibee, Griffin, and Billings. The indictment was neither ambiguous nor misleading and the evidence, which corresponded to the indictment, was more than sufficient for a conviction.

The Withdrawal Instruction

Defendant contends that the district court's instructions on withdrawal

from a conspiracy were erroneous because of its refusal to charge that the jury could consider Collibee's imprisonment as evidence that he withdrew from the conspiracy. We think our prior discussion of the evidence makes it clear that it was immaterial on the question of defendant's guilt whether or not Collibee withdrew from the conspiracy when he went to jail. By that time the conspiracy with defendant as the king pin was already established and functioning. The only effect that a withdrawal by Collibee could have had was on Billings, who has not appealed, or on Collibee himself and he was not indicted. Moreover, defendant by failing to request an instruction on this point and by not objecting to the court's

instruction has waived his right to argue the issue on appeal. Fed. R. Crim. P. 30.

The Trial Rulings

Defendant complains because the court did not give limiting instructions after DEA Agent Graffam testified that Collibee, after his release from jail, had told him that defendant had contacted him (Collibee) and asked him to arrange for a delivery of some precursors that could be used to manufacture methamphetamine, commonly known as "speed." Defendant is correct in describing this as "hearsay testimony of similar yet unrelated misconduct that had not resulted in criminal convictions or even indictments." Appellant's Brief at 27. Defendant is dead wrong, however, in arguing

that even though this testimony was introduced by his own attorney, it should have been sua sponte ruled inadmissible. The task of a trial judge is difficult enough without also saddling him with the responsibility of rescuing a defendant from the errors of his own counsel. "Sometimes called the doctrine of invited error, the accepted rule is that where the injection of allegedly inadmissible evidence is attributable directly to the action of the defense, its introduction does not constitute reversible error." United States v. Taylor, 508 F. 2d 761, 763 (5th Cir. 1975) (citations omitted).

Defendant's attempt to invoke the plain error doctrine also fails. The testimony by the DEA agent was not the result of a single stupid question.

It was part of cross-examination calculated to impeach Collibee's credibility and to show that it was improbable that defendant and Collibee were associated together in June of 1980. This may have been poor tactics and helped strengthen the government's case, but it was hardly plain error on the part of the district judge not to sua sponte instruct the jury that it should disregard the testimony.[4] See United States v. Esser, 520 F. 2d 213, 219 (7th Cir. 1975), cert. denied, 426 U.S. 947 (1976); United States v. Grooms, 454 F. 2d 1308, 1311 (7th Cir.), cert. denied, 409 U.S. 858 (1972).

Another trial ruling that defendant

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4. Billings' motion for a new trial because of the testimony was denied.

assigns as error was the district court's refusal to allow the introduction of certain hospital records into evidence. The framework in which this issue was drawn is as follows. Collibee testified that because of his fear of defendant and as a way of getting away from him, he had himself admitted to the Maine Medical Center as a patient in the fall of 1979. Collibee insisted on cross-examination that drug usage had nothing to do with his admission to the hospital; that it was solely due to his desire to get beyond the reach of defendant. The admission sheet of the hospital records states as follows: "William L. Collibee, 25 ys white CC: 'I'm under so much pressure that it feels like I'm going to explode. I came here for

help.'" It then is noted inter alia: "The pt. says he took a Quaalude today and realized that his drug habit and his pressures were escalating." The hospital records, read as a whole, disclose that Collibee had a severe drug addiction problem.

At the close of the government's case defendant sought to introduce the records on the question of Collibee's credibility. The court excluded them on the basis of Federal Rule of Evidence 608 (b) which provides in pertinent part: "Specific instances of the conduct of a witness for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence."

We do not think the district court erred in excluding the evidence. The admission sheet does not flatly contradict Collibee's stated reason for seeking admission to the hospital. The pressure to which he referred could have been applied by defendant. The records do contain extrinsic evidence of Collibee's prior use of drugs and it is in this respect that they are impeaching. Federal Rule of Evidence 608 (b) was properly invoked.

Defendant now argues for the first time that the hospital records should have been admitted as a prior inconsistent statement, Fed. R. Evid 613(b), or to show bias. Because neither of these theories was advanced below we review only for plain error and find none.

Although the admission sheet of the hospital records could be interpreted to contradict, at least partially, Collibee's stated reason for entering the hospital, we do not think its exclusion amounts to reversible error. The reason for Collibee's admission to the hospital was relevant only on the question of Collibee's fear of defendant and defendant's dominance over him. This in turn was only relevant to defendant's role in the conspiracy which, as far as Collibee was concerned, had been established long before the hospital admission. In fact, Collibee's hospital admission ended his active participation in the conspiracy. Because of its tangential relevancy and inherent ambiguity, we do not think defendant was prejudiced by the

exclusion of the hospital records.

The answer to the bias claim is simple; the records do not show any bias.

The final trial ruling to which defendant assigns error was the court's failure to give limiting instructions after Collibee testified that defendant had threatened him and his unborn child with physical harm. Defendant, however, has forfeited his right to appeal on this issue. No objection and request for a limiting instruction was made at the conclusion of the testimony. Fed. R. Evid. 103(a) (1) and 105. Nor were any limiting instructions included in defendant's requests submitted prior to the final jury charge and no specific objection was made to the omission from the charge of such an instruction. Fed. R. Crim. P. 30.

The Refusal to Charge As Requested

Defendant requested and properly objected to the failure of the district court to instruct along the following lines: "(t)he mere fact that a witness is employed by the Government of the United States or the State of New Hampshire or any other Governmental Agency does not entitle that witnesses' /sic/ testimony to any more weight or credence than other witnesses /sic/ not similarly employed."

A reading of the charge as a whole with special emphasis on the credibility section convinces us that there was no error in failing to give the requested instruction or a reasonable fascimile thereof. The court gave the standard accomplice instruction as to Collibee and Griffin. Its instruction on credibility was as follows:

It is for you alone as jurors to judge the credibility of the witnesses, that is, whether you believe all, part or none of their testimony as it has been presented to you. This applies to the exhibits in the case as well as to any testimony.

In considering the testimony of any witness, you may take into consideration the demeanor and appearance of the witness on the stand, how the witness answered the questions propounded, his or her knowledge of the facts and the interest of the witness, if any, in the final outcome of the case. You may also consider any demonstrated bias, prejudice or hostility of the witness toward either the Government or either defendant in determining the weight to be accorded the testimony of that witness.

Certain of the witnesses have been here allowed to testify as experts because the Court has found that they possess knowledge which might be of assistance to the jury in reaching its verdict. However, the same tests apply to the testimony of expert witnesses as to any other witnesses who have appeared before you.

We think this sufficed. Defendant has pointed to no case, nor have we been able to find one, holding that a special instruction on the credibility of Government witnesses might be required in a case such as this. We note that such an instruction is not included in Devitt and Blackmar's treatise on jury instructions. See I. E. Devitt & C. Blackman, Federal Jury Practice and Instructions ch. 17 (1977 & Supp. 1983).

Affirmed.